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Supreme Court, U.S.
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In The

Supreme Court of the United States

JAVIER ARMONDO DOMINGUEZ-RAMIREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN DENYING DOMINGUEZ-RAMIREZ'S MOTION TO SUPPRESS UNDER *GEORGIA v. RANDOLPH*,[1] WHEN DOMINGUEZ-RAMIREZ, ALTHOUGH NOT STANDING AT THE DOOR OF HIS HOME WHEN HE DID SO, HAD ALREADY BEEN CONSULTED BY LAW ENFORCEMENT AND ASKED FOR PERMISSION TO SEARCH HIS HOME AND HAD REFUSED CONSENT TO A SEARCH OF HIS HOME IN THE MIDDLE OF THE NIGHT, BUT LAW ENFORCEMENT AGENTS DID SO ANYWAY, RELYING UPON CONSENT FROM HIS WIFE ALONE.

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[1] *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 1520, 164 L.Ed.2d 208 (2006).

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, **JAVIER ARMONDO DOMINGUEZ-RAMIREZ**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. Javier Armondo Dominguez-Ramirez,* filed March 17, 2008. The decision of the Eleventh Circuit was unpublished, but a true and correct copy is included in Appendix A, *infra*. The Eleventh Circuit affirmed without discussion an order of the United States District Court for the Middle District of Florida, the Honorable William Terrell Hodges, dated June 8, 2006, adopting and confirming the Report and Recommendation of United States Magistrate Judge Gary R. Jones, dated May 15, 2006. A copy of the Report and Recommendation and District Court Order are included in Appendix A, *infra*.

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals (Appendix, *infra*) was unreported but a slip copy can be found at 2008 WL 724003.

JURISDICTION

This Petition seeks review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit on March 17, 2008, in *United States*

v. Javier Armondo Dominguez-Ramirez. The decision of the Eleventh Circuit was unpublished, but a true and correct copy is included in Appendix A, *infra*. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED[2]

Petitioner Dominguez-Ramirez filed a motion to suppress, which was referred to the Magistrate Judge for a report and recommendation ("R&R"). The

[2] Bracketed references are to the record on appeal at the Eleventh Circuit Court of Appeals.

Magistrate Judge conducted an evidentiary hearing and then issued a R&R recommending that the motion to suppress be denied. [R52] Neither party filed objections to the R&R. The District Court adopted the Magistrate's R&R. [R57] Under Eleventh Circuit precedent this was sufficient to preserve the question for *de novo* appellate review. The failure to object to the R&R meant only that the Petitioner was bound by the Magistrate Judge's findings of fact (but not conclusions of law) set forth in the R&R. The R&R is set forth in pertinent part as follows:

> . . . The Defendant, Co-Defendant Prudencio Rabadan-Ramirez and the Defendant's brother, Jose Dominguez-Ramirez, were arrested on January 14, 2006 at the Highway 40 Residence by a team of law enforcement officers from Immigration and Customs Enforcement ("ICE"), the Drug Enforcement Administration ("DEA"), the Orange County Sheriff's Office and the Marion County Sheriff's Office. The marihuana concealed in the furniture is not challenged by the Defendant in the instant motion to suppress. Rather, the focus of the instant motion to suppress concerns ten bricks of marihuana, wrapping material, currency, vacuum bags and other drug paraphernalia discovered by law enforcement officers during a subsequent search of Defendant's residence located at xxxxx, xxxxx, xx – a rental unit physically located on the property of a local horse farm named "Live Oak Farm" ("Live Oak Residence"), where the Defendant was employed.

Defendant contends that the search of the Live Oak Residence violated his rights under the Fourth Amendment to be free from unreasonable searches and seizures because the residence was searched without a warrant and ... relying upon *Georgia v. Randolph*, Defendant contends that even if his wife consented to the search, the search was invalid because consent was required from both the Defendant and his wife.

A. Evidence And Testimony

The United States called Felix Rodriguez, a drug agent for the Marion County Sheriff's Office, and Gary Sams, a Special Agent with the Drug Enforcement Administration, as witnesses. The Defendant called his wife, Patricia Dominguez, as his only witness.... Agent Rodriguez first became involved in the investigation in this case in January 2006 when he received a telephone call from ICE agents in Jacksonville advising that they had intercepted a shipment of furniture destined for Ocala, which had marihuana concealed inside the furniture. During the evening of January 14, 2006, after the arrest of the Defendant, Agent Rodriguez was present during a portion of the interview of the Defendant. The Defendant was interviewed by ICE Agent Chris Note and DEA Special Agent Florentino Rosales, who was speaking to the Defendant in Spanish. Agent Rodriguez is fluent in Spanish and was able

to understand the questions being asked to the Defendant and the Defendant's responses. During the interview, Agent Rosales asked the Defendant if law enforcement could search his residence, located at the Live Oak Farm. According to Agent Rodriguez, the Defendant responded that agents could search his house in the morning because the Defendant's wife was "hooked-up" to an insulin pump and the Defendant did not want her disturbed until morning. This portion of the interview took place between 1:00 and 2:30 a.m. Agent Rodriguez and Special Agent Sams also interviewed Defendant's brother, Jose Dominguez-Ramirez. The interview took place in Spanish with Agent Rodriguez providing all of the translation for Special Agent Sams. The Defendant's brother advised Agents Rodriguez and Sams that he rented a room from the Defendant at the Defendant's residence located at Live Oak Farm. Agents Rodriguez and Sams asked the Defendant's brother for permission to search his room at his brother's residence and the Defendant's brother consented to the search of his room. The Defendant's brother was then transported to the Live Oak Residence by Agent Rodriguez and agents from the DEA. When they arrived at the Live Oak Residence Agent Rodriguez, who was wearing a jacket prominently displaying "Marion County Sheriff's Office" and his badge, approached the front door and asked the Defendant's brother if he had a key. Defendant's brother advised Agent Rodriguez that he did

not have a key with him and as a result Agent Rodriguez was forced to knock on the front door. The Defendant's wife, Patricia Dominguez, answered the door. Agent Rodriguez explained to Mrs. Dominguez that her husband had been detained by law enforcement during an investigation in which marihuana had been confiscated. Agent Rodriguez advised Mrs. Dominguez that the Defendant's brother had consented to a search of his room at the house. Agent Rodriguez asked Mrs. Dominguez if agents could come into the residence and Mrs. Dominguez consented. While in the living room of the residence Agent Rodriguez explained to Mrs. Dominguez the details of the investigation and that her husband had been arrested. Agent Rodriguez told Mrs. Dominguez that her brother-in-law had consented to a search of his room but that it was up to her if she wanted the agents to search the house. Two of the agents went into the room rented by Jose Dominguez-Ramirez and conducted a search and Agents Rodriguez and Sams remained in the living room with Mrs. Dominguez. . . . While agents were conducting a search of the room rented by Jose Dominguez-Ramirez, Agents Rodriguez and Sams advised Mrs. Dominguez that her husband had consented to a search of the house but that he wanted agents to come back in the morning to conduct the search so that she would not be disturbed. Agent Rodriguez explained that agents came to the house anyway because the brother-in-law had

consented to the search of his room. Because Mrs. Dominguez already was awake Agent Rodriguez asked her if it was "okay" to search the residence. In response Mrs. Dominguez . . . asked Agent Rodriguez if he needed a search warrant and was told that he did not need one if she consented. . . . Agent Rodriguez also told Mrs. Dominguez that if she wanted, the agents would come back in the morning to search the house as her husband had wanted or they could search the house then. According to Agent Rodriguez, Mrs. Dominguez told him that it was fine to search the house then. Agent Rodriquez then went to his vehicle to obtain a consent to search form to be signed by Mrs. Dominguez. When Agent Rodriguez reentered the residence Agent Sams – who had begun the search after Mrs. Dominguez had consented – told Agent Rodriguez that Agent Sams had located a bag in a sock drawer in the bedroom which contained currency. Shortly thereafter one of the other agents located ten pounds of marihuana that had been hidden inside of a dryer in the laundry room. . . . Agents also located in the room rented by Jose Dominguez-Ramirez, wrapping material and other drug paraphernalia. Agent Rodriguez then filled out the "Permission To Search Residence" form, gave it to Mrs. Dominguez for her review and signature. Mrs. Dominguez signed the Permission To Search Residence form and it was then witnessed by Agent Sams. The consent to search form contains the notation "10-97 3:15,"

which denotes the arrival time at the Live Oak Residence. At the bottom of the consent to search form it contains the notation "0344," which refers to 3:44 a.m., the time Mrs. Dominguez signed the consent to search form. Shortly after Mrs. Dominguez executed the consent to search form the agents left the residence. . . . Turning first to the testimony that was not materially in conflict, there was no serious dispute between the testimony of the agents and the testimony of Mrs. Dominguez that four agents and Defendant's brother-in-law went to the Live Oak Residence and arrived at about 3:15 a.m. on January 14, 2006. The Government established – and the Defendant did not challenge – the fact that Defendant's brother-in-law, Jose Dominguez-Ramirez, rented a room at the Live Oak Residence and that he gave his verbal consent to law enforcement to search his room. . . . The evidence not in conflict establishes that law enforcement entered the residence with lawful authority. Mrs. Dominguez opened the door of the residence and allowed the agents to enter without objection. Indeed, the agents had authority from Jose Dominguez-Ramirez to search the room he rented at the residence. As such, any items discovered in his room were obtained as part of a lawful consent search. . . . All of these circumstances point toward a finding that the consent to search allegedly given by Mrs. Dominguez was given freely and voluntarily . . . Accordingly, for these reasons, the Court concludes that the agents

requested and obtained the voluntary consent of Mrs. Dominguez before searching the residence and, therefore, the search of the Live Oak Residence did not violate the Fourth Amendment.

B. *Georgia v. Randolph* Does Not Require Suppression

Relying upon *Georgia v. Randolph*, Defendant argues that "no valid consent could be obtained from Patricia Dominguez when the agents were already aware of Defendant Dominguez-Ramirez' refusal to consent to a search of his residence." Defendant's argument is misplaced for two reasons. First, it is incorrect to characterize the "consent" Defendant provided to the agents as "a refusal to consent to a search of his residence." The testimony was not controverted that the Defendant told agents they could search his residence but not until the morning. While the qualification "not to search until the morning" may have placed a time frame on the consent by the Defendant it was not a refusal to provide consent as Defendant suggests but rather a consent with qualification. Thus, in this case there was never a refusal to search by the co-owner husband sufficient to raise the issue of whether both tenants must consent before a search is conducted of jointly owned property. Secondly, even assuming arguendo that the Defendant's consent with qualification was viewed as a refusal to consent, Randolph is still

inapplicable because the Defendant, here, was not physically located at the premises when the refusal was made to law enforcement.

[R52]

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

THE DISTRICT COURT ERRED IN DENYING DOMINGUEZ-RAMIREZ'S MOTION TO SUPPRESS UNDER *GEORGIA v. RANDOLPH*,[3] WHEN DOMINGUEZ-RAMIREZ, ALTHOUGH NOT STANDING AT THE DOOR OF HIS HOME WHEN HE DID SO, HAD ALREADY BEEN CONSULTED BY LAW ENFORCEMENT AND ASKED FOR PERMISSION TO SEARCH HIS HOME AND HAD REFUSED CONSENT TO A SEARCH OF HIS HOME IN THE MIDDLE OF THE NIGHT, BUT LAW ENFORCEMENT AGENTS DID SO ANYWAY, RELYING UPON CONSENT FROM HIS WIFE ALONE.

SUMMARY OF ARGUMENT

This case frames the *Georgia v. Randolph* holding in a novel context. Law enforcement officers

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[3] *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 1520, 164 L.Ed.2d 208 (2006).

actually consulted with the defendant at the DEA office between 1:00 and 2:30 a.m. after arresting him and asked his consent to search his home. He conditionally refused consent to search. The officers were not satisfied with that refusal and disregarded it, going to his home at 3:30 a.m., waking his wife, and asking her permission to search the jointly occupied home. The officers left the defendant at the DEA office while they did this. The wife consented, the officers searched and drugs and cash were found. Although the defendant was not actually present at the doorway of the home when the wife's permission to search was requested, distinguishing this case from *Georgia v. Randolph*, the distinction is of no legal significance, because the officers in fact had already consulted the defendant, requested his permission, and they knew he had refused to consent. The requirement that the defendant be actually present when the officers request permission to search from a joint occupant applies only to those cases in which the defendant is merely a potential objector who is not present to voice an objection, placing no obligation or duty on law enforcement to seek out and consult a joint occupant who is not present before relying upon the consent of another joint occupant who is present.

The distinction has no bearing on the legal effect of a refusal that has already been expressed to police officers who in fact have already consulted with the objecting joint occupant. Such a person, the defendant in this case, is no longer a potential objector, but is a

joint occupant whose objection has been made known to the police.

As such his objection carries controlling weight under *Georgia v. Randolph*, which we argue stands for the proposition that either of two joint tenants can refuse law enforcement the right to search jointly occupied premises. Where the objecting join tenant was physically standing when he expressed his objection to law enforcement is legally irrelevant. Thus under *Georgia v. Randolph* the search in this case, which was premised on the wife's contrary consent, was unlawful.

ARGUMENT

Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 1520, 164 L.Ed.2d 208 (2006) holds that police violate the Fourth Amendment when they conduct a search, authorized by a person with apparent authority to consent, over the objection of a physically present potential defendant who shares the premises and declines to offer his consent. *United States v. Wilburn*, 473 F.3d 742, 744 (7th Cir. 2007). Although *Randolph* is a narrow holding, it is not so narrow as to lack application when the searching law enforcement officers first sought out the co-tenant and asked his consent to search and he conditionally denied consent. In our case the officers were on actual notice that the co-occupant had objected to the very consent to search they were seeking from the other co-tenant,

his sick wife. Here the officers knew that Dominguez-Ramirez had expressly forbidden what they were doing. On these facts it is legally irrelevant that Dominguez-Ramirez was standing at the door of the DEA office and not at the door to his home when he objected; the controlling fact is that the officers consulted Dominguez-Ramirez and he objected. *Georgia v. Randolph* gives controlling weight to the *objection* of either joint tenant when both are asked.

The majority opinion in *Randolph* distinguished *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), which recognized the permissibility of a search made with the consent of one co-occupant in the other's absence. The "absent" defendant in *Matlock* was arrested in the front yard of a house and detained in a squad car nearby while officers, at the doorway of the house, obtained consent to search from a woman with whom he lived.

Addressing the significance of *Matlock* and also *Illinois v. Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), a case involving a defendant who was asleep when police obtained consent from a co-tenant, this Court observed:

> Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by

> today's holding, we have to admit that we are drawing a fine line; *if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.*
>
> This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

Randolph, 126 S.Ct. at 1527-1528 [emphasis added].

This Court went on to defend this admittedly formalistic rule, noting that requiring police to search out *potential* objectors would limit their "capacity . . . to respond to ostensibly legitimate opportunities in the field" and turn every third-party consent case into "*a test about the adequacy of the police's efforts to consult with a potential objector.*"

Our case is *not* a "test about the adequacy of the police's *efforts to consult* with a *potential* objector . . . " because in this case the police had already sought out Dominguez-Ramirez, asked his consent, been refused,

and already *knew* that Dominguez-Ramirez *had in fact objected to precisely what they were doing*. Therefore the DEA was not entitled to the benefit of the exception contemplated by *Georgia v. Randolph* for a *potential* objector.

Nor does this case present a question of law enforcement responding to "legitimate opportunities in the field." Law enforcement asked Dominguez-Ramirez for permission to go search his house – he said no, not now; but that did not deter the police, instead they then went and sought permission from his brother, then his wife, after having already been denied permission by Dominguez-Ramirez. This conduct is simply not within the scope of that permitted law enforcement under the exception in *Georgia v. Randolph*. This was not a case of law enforcement responding to an opportunity that presented itself in the field and under *Georgia v. Randolph* not being required to first go seek out the other joint tenant to obtain his permission. Our case turns *Georgia v. Randolph* on its head, because the police first sought out Dominguez-Ramirez, he refused, the police then went into the field.

United States v. Groves, 470 F.3d 311, 320 (7th Cir. 2006), explains the basis of *Randolph's* holding, quoting from *Randolph*:

> The tenants might have made an exceptional agreement that no one would admit a guest without the consent of all, but the police were entitled to rely on the more usual expectation that no such agreement existed.

> *Randolph,* 126 S.Ct. at 1522. *However, a visitor standing at the door of shared premises at the invitation of one occupant would have no confidence that one person's invitation was sufficient to enter when the other occupant says, "Stay out." Randolph,* 126 S.Ct. at 1522-23. "Without some very good reason, no sensible person would go inside under those conditions." 126 S.Ct. at 1523. [emphasis supplied]

In our case, Dominguez-Ramirez had already been heard to say, "Stay out!" thus the police could not go inside under these conditions, even under the "narrow" holding of *Randolph*. As the Court held in *Randolph*:

> This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent.

Georgia v. Randolph, 126 S.Ct. 1515, 1528 (2006).

Nothing in *Randolph* supports the decision that the police can disregard a defendant's express objection. The Magistrate Judge's R&R, which was adopted by the District Court, concluded that *Randolph* did not apply because (1) the defendant had not expressly objected to the search, and (2) he was not physically present when the wife consented:

> Relying upon *Georgia v. Randolph*, Defendant argues that "no valid consent could be obtained from Patricia Dominguez when the agents were already aware of Defendant Dominguez-Ramirez' refusal to consent to a search of his residence." Defendant's argument is misplaced for two reasons. First, it is incorrect to characterize the "consent" Defendant provided to the agents as "a refusal to consent to a search of his residence." The testimony was not controverted that the Defendant told agents they could search his residence but not until the morning. While the qualification "not to search until the morning" may have placed a time frame on the consent by the Defendant it was not a refusal to provide consent as Defendant suggests but rather a consent with qualification. Thus, in this case there was never a refusal to search by the co-owner husband sufficient to raise the issue of whether both tenants must consent before a search is conducted of jointly owned property. Secondly, even assuming *arguendo* that the Defendant's consent with qualification was viewed as a refusal to consent, *Randolph* is still inapplicable because the Defendant, here, was not physically located at the premises when the refusal was made to law enforcement.

[R52]

The Magistrate's legal conclusion is incorrect, however, that the refusal to permit a search in the

middle of the night was anything other than just that, a refusal to permit a middle of the night search.

> [T]he Defendant told agents they could search his residence but not until the morning. While the qualification "not to search until the morning" may have placed a time frame on the consent by the Defendant it was not a refusal to provide consent as Defendant suggests but rather a consent with qualification . . .

[R52]

This would work for the Government if the Government had complied with the authorization the Defendant gave, and waited until morning to do the search. But they did not do that. We would agree that had the Government waited until morning, then went to the home and asked the wife for permission to search, under *Randolph* the wife's consent at that point would have been sufficient, even if in the interim the Defendant have changed his mind – so long as the Government did not know the Defendant had changed his mind. That is, the Government would not, under *Randolph*, had been required to go back to the Defendant and confirmed that his conditional consent was still valid if the Government had waited until the morning to do the search, as he had authorized.

But that is not what the Government did. The Government did not rely upon his consent, but instead correctly understood and applied his statement as a refusal to consent to search in the middle of the

night (three in the morning), prompting the Government to engage in the gambit of obtaining consent to search the brother's rented bedroom, which became the camel's nose under the tent, leading to the request directed to the wife to search the entire home, which led in turn to the discovery of the marijuana in the dryer in the laundry room.

The Defendant had not consented to a middle of the night intrusion into his home, the Government agents clearly understood that, and did not attempt to travel under his "conditional consent" to conduct the search they conducted. It is no answer to try to misconstrue the Defendant's refusal to consent to a middle of the night search into anything other than what it was and the District Court cannot be upheld on that basis.

Second, the District Court's alternative holding is equally unavailing. The District Court argued in the alternative that even were Dominguez-Ramirez deemed to have objected the fact that he was not physically present when the wife consented was sufficient to take the case out from under *Randolph*. Surely not. Although it is correct that *Randolph* refers to the physically present co-tenant, it later clarifies what that is intended to cover and what it excludes:

> If *Matlock*'s co-tenant is giving permission "in his own right," how can his "own right" be eliminated by another tenant's objection? The answer appears in the very footnote from which the quoted statement is taken:

the "right" to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. Thus, to ask whether the consenting tenant has the right to admit the police when a physically present fellow tenant objects is not to question whether some property right may be divested by the mere objection of another. It is, rather, **the question whether customary social understanding accords the consenting tenant authority powerful enough to prevail *over the co-tenant's objection*. The *Matlock* Court did not purport to answer this question**, a point made clear by another statement (which the dissent does not quote): the Court described the cotenant's consent as good against "the absent, nonconsenting resident." *Id.*, at 170, 94 S.Ct. 988.

The second loose end is the significance of *Matlock* and *Rodriguez* after today's decision. Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that

> we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas **the *potential* objector, nearby *but not invited to take part* in the threshold colloquy, loses out.**
>
> ***This is the line we draw***, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, **there is practical value in the simple clarity of complementary rules**, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other ***according dispositive weight to the fellow occupant's contrary indication when he expresses it***.

Georgia v. Randolph, 126 S.Ct. 1515, 1527 (2006) [emphasis supplied].

In distinguishing *Matlock* and *Rodriguez*, this Court made clear that the line that is drawn is against *potential* objecting co-tenants, whose consent was not requested and therefore not obtained, not co-tenants who have actually objected as did Dominguez-Ramirez. The line drawn by the Court *protects* the Fourth Amendment rights of co-tenants who have objected, as did the defendant in this petition. The "formalistic" distinction the Court drew does not come down against a person whose objection is actually voiced to the police, but then ignored.

This Court's final word was to explain that *dispositive* weight is to be accorded a fellow occupant's "contrary indication" when he expresses it. Dominguez-Ramirez expressed his "contrary indication," therefore the search later consented to by his wife violated his Fourth Amendment right to be free from an unreasonable search and seizure and the evidence derived therefrom must be suppressed.

We respectfully request the Court to grant certiorari to review the question presented by this case, which presents a common and recurring variation of the *Georgia v. Randolph* rule.[4]

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[4] We draw the Court's attention to *United States v. Hudspeth*, ___ F.3d ___, 2008 WL 637638 (8th Cir. 2008) (*en banc*), holding that the Fourth Amendment was not violated when officers sought the wife's consent to search a home despite having received the husband's previous refusal; the wife was a co-tenant authorized to give officers consent to search; the husband was not present when the officer asked the wife for consent, and the officer was not required to inform the wife that the husband, who had been arrested at his place of employment, had refused consent. *Cf. United States v. Murphy*, ___ F.3d ___, 2008 WL 441837 (9th Cir. 2008), holding that the consent of either co-tenant to officers' search of property may be sufficient in the absence of an objection by the other, either because the co-tenant simply fails to object or because he is not present to do so, but nevertheless, when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him and no evidence seized may be used against him. Murphy's refusal was apparently made at the door of the place to be searched, he was arrested and removed, then two hours later a co-tenant consented to the search.

CONCLUSION

WHEREFORE, the Petitioner, JAVIER ARMONDO DOMINGUEZ-RAMIREZ, respectfully requests this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-10953

D. C. Docket No. 06-00006-CR-OC-10-GRJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAVIER ARMONDO DOMINGUEZ-RAMIREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 17, 2008)

Before HULL and WILSON, Circuit Judges, and EDENFIELD*, District Judge.

PER CURIAM:

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* Honorable B. Avant Edenfield, United States District Judge for the Southern District of Georgia, sitting by designation.

Javier Armondo Dominguez-Ramirez ("Dominguez-Ramirez") appeals his convictions and concurrent sentences for: (1) conspiracy to possess with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B)(vii); (2) possession with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(vii) and 18 U.S.C. § 2; and (3) two counts of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(D) and 18 U.S.C. § 2. Dominguez-Ramirez argues that the district court erred in (1) denying his motion to suppress evidence found at his house;[1] (2) calculating his advisory sentencing guidelines offense level based on a drug quantity determination that was unsupported by the evidence;[2] (3) applying an aggravating role enhancement under U.S.S.G. § 3B1.1(c) that was unsupported by the evidence;[3]

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[1] "A district court's ruling on a motion to suppress presents a mixed question of law and fact." *United States v. Zapata,* 180 F.3d 1237, 1240 (11th Cir. 1999). We review the district court's findings of fact for clear error and the district court's application of the law to those facts *de novo. Id.* The party challenging the validity of a search bears the burdens of proof and persuasion. *United States v. Cooper,* 133 F.3d 1394, 1398 (11th Cir. 1998).

[2] "We review a district court's determination of the quantity of drugs used to establish a base offense level for sentencing purposes under the clearly erroneous standard." *United States v. Simpson,* 228 F.3d 1294, 1298 (11th Cir. 2000).

[3] A district court's determination of a defendant's role in an offense is a finding of fact that we review for clear error. *United States v. De Varon,* 175 F.3d 930, 937-38 (11th Cir. 1999) (*en banc*)

(4) failing to state adequate reasons for imposing a sentence in the middle of the advisory guidelines range of 151 to 188 months' imprisonment, in contravention of 18 U.S.C. § 3553(c)(1);[4] and (5) applying the advisory guidelines in a *de facto* mandatory fashion by imposing guidelines enhancements that were not charged in the indictment and not found by the jury beyond a reasonable doubt, in violation of the Fifth and Sixth Amendments.[5]

After review and oral argument, we conclude that each of Dominguez-Ramirez's claims on appeal lack merit, and that the district court committed no reversible error in denying Dominguez-Ramirez's amended motion to suppress or in sentencing

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[4] A district court's compliance with § 3553(c)(1) is reviewed *de novo*. *United States v. Bonilla*, 463 F.3d 1176, 1181 (11th Cir. 2006).

[5] If a defendant preserves a constitutional objection to his sentence, we review the sentence *de novo* and vacate and remand only if there is harmful error. *United States v. Paz*, 405 F.3d 946, 948 (11th Cir. 2005). The parties dispute whether or not Dominguez-Ramirez preserved this argument before the district court. We need not resolve that dispute, however, because even under *de novo* review, the underlying argument is meritless. *See United States v. Rodriguez*, 398 F.3d 1291, 1300-01 (11th Cir. 2005) (concluding that extra-verdict enhancements are constitutional in an advisory guidelines system after *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005)); *see also* Br. of Appellant at 26 ("This argument is presented solely to preserve the issue for either *en banc* review or subsequent review at the Supreme Court. Counsel recognizes that it appears foreclosed by current precedent.").

Dominguez-Ramirez. Therefore, we affirm Dominguez-Ramirez's convictions and sentences.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

-vs-

Case No. 5:06-cr-6-Oc-10GRJ

JAVIER DOMINGUEZ-RAMIREZ

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ORDER

(Filed June 9, 2006)

Following completion of an evidentiary hearing, the United States Magistrate Judge issued a report (Doc. 52) recommending that Defendant Javier Dominguez-Ramirez's Amended Motion to Suppress Evidence (Doc. 49) be DENIED. There have been no objections to the report and recommendation of the Magistrate Judge, and the time for objection has elapsed.

Accordingly, upon an independent examination of the file and upon due consideration, it is adjudged that:

(1) the report and recommendation of the Magistrate Judge (Doc. 52) is adopted, confirmed and made a part hereof; and

(2) the Defendant's Amended Motion to Suppress Evidence (Doc. 49) is DENIED.

IT IS SO ORDERED

DONE and ORDERED at Ocala, Florida this 8th day of June, 2006.

/s/ William Terrell Hodges
UNITED STATES
DISTRICT JUDGE

Copies to: United States Attorney
United States Marshal
United States Probation Office
U.S. Pretrial Services Office
Counsel of Record
Maurya McSheehy, Courtroom Deputy
Javier Dominguez-Ramirez

App. 7

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v.

JAVIER DOMINGUEZ-RAMIREZ

Case No. 5:06-cr-6-Oc-10GRJ

REPORT AND RECOMMENDATION[1]

(Filed May 15, 2006)

Pending before the Court is Defendant's Amended Motion To Suppress Evidence.[2] (Doc. 49.) The United States has filed a Response. (Doc. 47.) An evidentiary hearing was held before the undersigned on May 2, 2006 and, accordingly, the matter is ripe for review. For the reasons discussed below Defendant's Amended Motion To Suppress Evidence is due to be **DENIED**

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[1] Specific, written objections may be filed in accordance with 28 U.S.C. § 636, and Rule 6.02, Local Rules, United States District Court, Middle District of Florida, within ten (10) days after service of this document. Failure to file timely objections shall bar the party from a *de novo* determination by a district judge and from attacking factual findings on appeal.

[2] Defendant also filed a Motion To Suppress Evidence. (Doc. 42.) The only change in the amended motion concerns several changes in paragraph one, none of which impacted the Court's determination of the motion.

I. Introduction

The Defendant and an associate, Prudencio Rabadan-Ramirez, are charged in this case in a four count indictment with conspiracy to possess with intent to distribute 100 kilograms or more of marihuana, aiding and abetting with each other to possess with intent to distribute 100 kilograms or more of marihuana, and aiding and abetting with another to possess with intent to distribute a detectable amount of marihuana.

The investigation in this case began on or about January 5, 2006, when agents from Immigration and Customs Enforcement ("ICE") intercepted eight pallets of bedroom furniture at the point of entry in El Paso, Texas, that contained packages of marihuana concealed within the furniture.[3] The pallets – which contained more than 500 kilograms of marihuana concealed inside – were destined for an address in Ocala, Florida located at 10560 West Highway 40 ("Highway 40 Residence"). Law enforcement officers decided to make a controlled delivery of the pallets. The pallets were flown to the Naval Air Station in Jacksonville, Florida and then transported to the Customs and Border Protection facility located at the Orlando International Airport for delivery to United Parcel Service Airfreight for pick-up. On January 14, 2006 the pallets were picked-up by co-defendant, Prudencio Rabadan-Ramirez in a rented U-Haul and

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[3] Doc. 1, ¶4.

were transported by him to the Highway 40 Residence in Ocala, where he was later met by the Defendant and the Defendant's brother, Jose Dominguez-Ramirez.

The Defendant, Co-Defendant Prudencio Rabadan-Ramirez and the Defendant's brother, Jose Dominguez-Ramirez, were arrested on January 14, 2006 at the Highway 40 Residence by a team of law enforcement officers from Immigration and Customs Enforcement ("ICE"), the Drug Enforcement Administration ("DEA"), the Orange County Sheriff's Office and the Marion County Sheriff's Office. The marihuana concealed in the furniture is not challenged by the Defendant in the instant motion to suppress. Rather, the focus of the instant motion to suppress concerns ten bricks of marihuana, wrapping material, currency, vacuum bags and other drug paraphernalia discovered by law enforcement officers during a subsequent search of Defendant's residence located at 3720 S.W. 95th Avenue, Ocala, Florida – a rental unit physically located on the property of a local horse farm named "Live Oak Farm" ("Live Oak Residence"), where the Defendant was employed.

Defendant contends that the search of the Live Oak Residence violated his rights under the Fourth Amendment to be free from unreasonable searches and seizures because the residence was searched without a warrant and the consent to search given by the Defendant's wife to law enforcement was not

consensual. Alternatively, relying upon *Georgia v. Randolph,*[4] Defendant contends that even if his wife consented to the search, the search was invalid because consent was required from both the Defendant and his wife.

II. Evidence And Testimony

The United States called Felix Rodriguez, a drug agent for the Marion County Sheriff's Office, and Gary Sams, a Special Agent with the Drug Enforcement Administration, as witnesses. The Defendant called his wife, Patricia Dominguez, as his only witness.

Agent Rodriguez has been employed by the Marion County Sheriff's Office for fourteen years, four of which have been in the drug unit. Agent Rodriguez first became involved in the investigation in this case in January 2006 when he received a telephone call from ICE agents in Jacksonville advising that they had intercepted a shipment of furniture destined for Ocala, which had marihuana concealed inside the furniture. During the evening of January 14, 2006, after the arrest of the Defendant, Agent Rodriguez was present during a portion of the interview of the Defendant. The Defendant was interviewed by ICE Agent Chris Note and DEA Special Agent Florentino Rosales, who was speaking to the

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[4] ___ U.S. ___, 126 S.Ct. 1515 (2006).

Defendant in Spanish. Agent Rodriguez is fluent in Spanish and was able to understand the questions being asked to the Defendant and the Defendant's responses.

During the interview, Agent Rosales asked the Defendant if law enforcement could search his residence, located at the Live Oak Farm. According to Agent Rodriguez, the Defendant responded that agents could search his house in the morning because the Defendant's wife was "hooked-up" to an insulin pump and the Defendant did not want her disturbed until morning. This portion of the interview took place between 1:00 and 2:30 a.m.

Agent Rodriguez and Special Agent Sams also interviewed Defendant's brother, Jose Dominguez-Ramirez. The interview took place in Spanish with Agent Rodriguez providing all of the translation for Special Agent Sams. The Defendant's brother advised Agents Rodriguez and Sams that he rented a room from the Defendant at the Defendant's residence located at Live Oak Farm. Agents Rodriguez and Sams asked the Defendant's brother for permission to search his room at his brother's residence and the Defendant's brother consented to the search of his room. The Defendant's brother was then transported to the Live Oak Residence by Agent Rodriguez and agents from the DEA. When they arrived at the Live Oak Residence Agent Rodriguez, who was wearing a jacket prominently displaying "Marion County Sheriff's Office" and his badge, approached the front door and asked the Defendant's brother if he had a key.

Defendant's brother advised Agent Rodriguez that he did not have a key with him and as a result Agent Rodriguez was forced to knock on the front door. The Defendant's wife, Patricia Dominguez, answered the door. Agent Rodriguez explained to Mrs. Dominguez that her husband had been detained by law enforcement during an investigation in which marihuana had been confiscated. Agent Rodriguez advised Mrs. Dominguez that the Defendant's brother had consented to a search of his room at the house. Agent Rodriguez asked Mrs. Dominguez if agents could come into the residence and Mrs. Dominguez consented.

While in the living room of the residence Agent Rodriguez explained to Mrs. Dominguez the details of the investigation and that her husband had been arrested. Agent Rodriguez told Mrs. Dominguez that her brother-in-law had consented to a search of his room but that it was up to her if she wanted the agents to search the house. Two of the agents went into the room rented by Jose Dominguez-Ramirez and conducted a search and Agents Rodriguez and Sams remained in the living room with Mrs. Dominguez. None of the agents were wearing "SWAT" gear and they were dressed in jeans and a jacket identifying them as law enforcement. At no time were any guns drawn or removed from holsters by any of the agents. While agents were conducting a search of the room rented by Jose Dominguez-Ramirez, Agents Rodriguez and Sams advised Mrs. Dominguez that her husband had consented to a search of the house but

that he wanted agents to come back in the morning to conduct the search so that she would not be disturbed. Agent Rodriguez explained that agents came to the house anyway because the brother in law had consented to the search of his room. Because Mrs. Dominguez already was awake Agent Rodriguez asked her if it was "okay" to search the residence. In response Mrs. Dominguez asked Agent Rodriguez what he was looking for and was told that agents were looking for marihuana or large amounts of money. Mrs. Dominguez told Agent Rodriguez that there was nothing like that in the house. When Agent Rodriguez explained to Mrs. Dominguez about the consent to search Mrs. Dominguez asked Agent Rodriguez if he needed a search warrant and was told that he did not need one if she consented. According to Agent Rodriguez, Mrs. Dominguez never asked him what would happen if she did not give her consent. Mrs. Dominguez was told by Agent Rodriguez that if agents found any contraband it would be taken from the house. Mrs Dominguez asked Agent Rodriguez whether she was going to be arrested if agents recovered anything and was told by Agent Rodriguez that she was not a target of the investigation. Agent Rodriguez also told Mrs. Dominguez that if she wanted the agents would come back in the morning to search the house as her husband had wanted or they could search the house then. According to Agent Rodriguez, Mrs. Dominguez told him that it was fine to search the house then.

Agent Rodriquez then went to his vehicle to obtain a consent to search form to be signed by Mrs. Dominguez. When Agent Rodriguez reentered the residence Agent Sams – who had begun the search after Mrs. Dominguez had consented – told Agent Rodriguez that Agent Sams had located a bag in a sock drawer in the bedroom which contained currency. Shortly thereafter one of the other agents located ten pounds of marihuana that had been hidden inside of a dryer in the laundry room. Mrs. Dominguez denied having any knowledge of the marihuana in the dryer and told Agent Rodriguez that she had not looked inside the dryer since the previous Sunday when she did the laundry. Agents also located in the room rented by Jose Dominguez-Ramirez, wrapping material and other drug paraphernalia. Agent Rodriguez then filled out the "Permission To Search Residence" form, gave it to Mrs. Dominguez for her review and signature. Mrs. Dominguez signed the Permission To Search Residence form[5] and it was then witnessed by Agent Sams.

The consent to search form contains the notation "10-97 3:15," which denotes the arrival time at the Live Oak Residence. At the bottom of the consent to search form it contains the notation "0344," which refers to 3:44 a.m., the time Mrs. Dominguez signed the consent to search form. Shortly after Mrs.

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[5] Government Ex. "1".

Dominguez executed the consent to search form the agents left the residence.

Special Agent Sams provided essentially the same testimony as Agent Rodriguez with only slight differences. Agent Sams has been in law enforcement for 33 years, twenty of which have been as a Special Agent with the DEA. Agent Sams confirmed that Defendant's brother consented to the search of the room he rented from his brother at the Live Oak Residence. According to Agent Sams, when he, Agent Rodriguez, another DEA agent and Defendant's brother arrived at the Live Oak Residence Agent Rodriguez knocked on the door, which was answered by Patricia Dominguez. Agent Sams asked if the agents could come into her house because they wanted to talk to her about an incident involving her husband. Mrs. Dominquez allowed the agents inside of the residence. Agent Sams and the other agents entered the residence and sat down in the living room on a couch and explained to Mrs. Dominguez that her husband had been arrested for trafficking in marihuana and that agents believed there might be additional contraband in the house. Agents told Mrs. Domnguez [sic] that her husband had consented to the search of the residence. Mrs. Dominguez asked whether the agents needed to get a search warrant and was told that they did not need to get one if she granted consent. Agent Sams also told her that her husband had consented to a search but her husband wanted agents to wait until the morning to conduct the search but that the agents wanted to take care of

the search while they were there. According to Agent Sams, Mrs. Dominguez told the agents they could search the house.

Based on this consent, Agent Sams went to the bedroom first while Agent Rodriguez went outside to his truck to obtain a consent to search form. While searching a sock drawer in a dresser in the bedroom Agent Sams located a bag with money in it. Agent Sams testified that agents never yelled at Mrs. Dominguez nor did they tell her that if she did not consent agents would obtain a search warrant and search the house. During the search Mrs. Dominguez asked if she was going to be charged if agents found any contraband. Mrs. Dominguez was told by agents that she was not a suspect or target of the investigation at that point and would not be arrested that evening. Agent Sams testified that agents never told Mrs. Dominguez that if she signed the consent to search form she would not be arrested or charged.

The Defendant called his wife, Patricia Dominguez, to testify about the events that transpired at the Live Oak Residence that evening. Mrs. Dominguez, is a 46 year old high school graduate presently employed as a fork lift operator for Closet Maid in Ocala. She is fluent in English and testified without the need for an interpreter. Her husband – the Defendant – worked at Live Oak Farm as a foreman and assistant trainer. Because of his job duties, which involved caring for the horses on the farm, it was not unusual for him to be out all night.

According to Mrs. Dominguez, agents rang the doorbell of the Live Oak Residence at about 3:15 a.m on January 14, 2006 and woke her up. Mrs. Dominguez and her husband have lived in the Live Oak Residence for about eight years. When Mrs. Dominguez opened the door there were four agents standing there with her brother-in-law. Her brother-in-law, Jose Dominguez-Ramirez, had been renting a room in the house from them for about one and a half months. However, even though her brother was a tenant he did not have a key the residence. Mrs. Dominguez testified that Agent Rodriguez told her that her husband had been arrested for drug trafficking and that her brother-in-law had given his consent to search his room. Mrs. Dominguez testified that she asked the agents if they had a search warrant. She said she knew to ask for a warrant because she watches "a lot of Law And Order" and she knows "a little bit [about] the law." Agents told her that they did not need a search warrant to search her brother-in-law's room because he had given permission. Mrs. Dominguez told agents it was "okay." All four of the agents entered the residence with her brother-in-law. Two of the agents went into the room rented by her brother-in-law and Agents Rodriguez and Sams went with Mrs. Dominguez and sat on the couch in the residence. According to Mrs. Dominguez, the agents were in her brother-in-law's room for about ten minutes but did not find anything. Before she had discussed with agents her consent to search the residence, she testified that she saw one of the agents

in the computer room across the hallway from where she was sitting.[6]

Mrs. Dominguez also testified that Agent Rodriquez went into the laundry room "probably when the other officers were in the computer room." Even though agents were in rooms of the house – other than her brother-in law's room – Mrs. Dominguez never instructed them to leave or not to enter any rooms of the residence other than the rented room. According to Mrs. Dominguez, Agents found money in her sock drawer without her permission before agents located the marihuana in the dryer. When agents found the money in the sock drawer in the dresser agents asked Mrs. Dominguez if she knew where the money had come from. She told them that she did not know and that she does not go into the sock drawer very often.

According to Mrs. Dominguez' version of the events, after agents found the marihuana in the dryer they filled out the consent to search form and told her that if she signed the form she would not be arrested for what they had found in the residence. Mrs.

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[6] This testimony is consistent with the testimony of Agent Rodriguez, who testified on rebuttal that when the agents entered the residence two of the agents made a "protective sweep" to insure that there were not any other individuals in the residence. Notably, Mrs. Dominguez did not testify that the agents began a search of the computer room at that time. After the protective search the agents initiated the search of the room rented by Jose Dominguez-Ramirez.

Dominguez testified that agents left the residence about ten minutes after she signed the consent to search form. Thus, according to Mrs. Dominguez, she never gave permission to search any part of the house other than her brother-in-law's room and agents never asked her for permission to search the residence. While Mrs. Dominguez never denied reading the consent to search form she testified that she read as much as she could understand on the form.

III. ANALYSIS OF ISSUES

A. Patricia Dominguez' Consent To Search The Residence

One of the exceptions to the Fourth Amendment requirement that law enforcement obtain a search warrant before searching a private residence is where the resident voluntarily consents to the search.[7] For the consent to be sufficient to overcome Fourth Amendment scrutiny the consent must have been given freely and voluntarily and not merely as an acquiescence to law enforcement authority.[8] The determination of voluntariness must be conducted by an examination of the totality of the circumstances, taking into account factors such as: the person's youth, the person's education, the existence of advice

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[7] *Illinois v. Rodriguez,* 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

[8] *Bumper v. North Carolina,* 391 U.S. 543, 548 (1968).

as to the nature of the constitutional right involved, the length of the detention preceding the request to consent, the nature of the prior questioning, and whether any physical threats were made.[9]

As highlighted in the testimony discussed above, there is a sharp conflict between the testimony of Mrs. Dominguez and the testimony of Agents Rodriguez and Sams concerning whether Mrs. Dominguez gave consent to the agents to search the Live Oak Residence. The Court will first examine the testimony of the witnesses that was consistent to determine whether these events evidence that the consent given by Mrs. Dominguez was voluntary. Secondly, the Court will then resolve the conflicting testimony to determine whether the credible evidence establishes that the consent was voluntary.

Turning first to the testimony that was not materially in conflict, there was no serious dispute between the testimony of the agents and the testimony of Mrs. Dominguez that four agents and Defendant's brother-in-law went to the Live Oak Residence and arrived at about 3:15 a.m. on January 14, 2006. The Government established – and the Defendant did not challenge – the fact that Defendant's brother-in-law, Jose Dominguez-Ramirez, rented a room at the Live Oak Residence and that he gave his verbal consent to law enforcement to search his room. The testimony also was not in dispute that law enforcement never

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[9] *Schneckloth v. Bustamante,* 412 U.S. 218, 226 (1973).

pointed a gun, never drew a weapon while at the residence, never yelled or threatened Mrs. Dominguez and that the agents were only wearing jeans and jackets identifying themselves as law enforcement officers.

Mrs. Dominguez agreed that when the agents arrived at the residence agents informed her that her husband had been arrested or detained for trafficking in marihuana. Additionally, although there were slight variations in the testimony, Mrs. Dominguez and the agents all testified that Mrs. Dominguez asked agents if they needed a search warrant and she was told that agents did not need one if Mrs. Dominguez consented to the search. Mrs. Dominguez read – but said she did not understand – and signed the "Permission To Search Residence" form, which was presented to her after the search had been conducted and the agents had located the currency in the sock drawer and had found the ten pounds of marihuana in the dryer in the laundry room.

The Permission To Search Residence form provides in relevant part that Mrs. Dominguez authorize[s] agents "to search my residence . . . any and all rooms, closets, out buildings of any type, any and all containers and personal property located therein . . . " Notably, the form recites that: "This written permission to search without a warrant is given by me to the above officer(s) freely and voluntarily, without any threats or promises having been made." While this form was signed after the search had been completed – and therefore is not totally dispositive of whether

consent was given – the form is, nonetheless, written in simple easy to understand language.

The evidence not in conflict establishes that law enforcement entered the residence with lawful authority. Mrs. Dominguez opened the door of the residence and allowed the agents to enter without objection. Indeed, the agents had authority from Jose Dominguez-Ramirez to search the room he rented at the residence. As such, any items discovered in his room were obtained as part of a lawful consent search. Moreover, there was no testimony that law enforcement utilized any coercive police tactics or that the Defendant did not understand that she had a right to insist that law enforcement obtain a search warrant. Mrs. Dominguez readily admitted that she asked the agents whether they needed a warrant to search the premises and that she knew to ask this question because she watched police shows on television and knew a little bit about the law. As such, there was no question that Mrs. Dominguez knew and understood that if she did not consent to the search the agents could not search the residence without a warrant. All of these circumstances point toward a finding that the consent to search allegedly given by Mrs. Dominguez was given freely and voluntarily.

The analysis of whether the consent was voluntary does not end here because the Court must resolve a sharp conflict in the testimony with regard to whether consent was given by Mrs. Dominguez. Mrs. Dominguez testified that the agents never requested

permission to search the residence and therefore she never gave her oral consent before the Permission To Search Residence form was signed. Both Agents Rodriguez and Sams testified that they told Mrs. Dominguez they needed her permission and that Mrs. Dominguez told them it was fine to do so.

Having observed the testimony of the witnesses and their demeanor the Court finds that on this issue Mrs. Dominguez' testimony was not entirely credible for several reasons. First, Mrs. Dominguez admitted that she asked agents whether they needed a warrant to search the residence and was told that they did not if she consented. It is not plausible that this discussion took place and then agents proceeded to search the entire residence without ever having asked her for permission and without Mrs. Dominguez ever voicing an objection before or during the search.

Secondly, Mrs. Dominguez' testimony is inconsistent with the factual representations in Defendant's Motion to Suppress. In Defendant's Motion To Suppress, Defendant asserts that "While inside the residence, after having been there for at least one half hour, the agents requested permission to search the entire residence, and told [Mrs. Dominguez] that if she did not consent, they would 'get a search warrant and search it anyway." Mrs. Dominguez never testified that agents threatened that if she did not consent they would get a warrant and search the residence anyway. Even more telling is the fact that Mrs. Dominguez never testified that she had any discussion with the agents about searching the entire

residence. Thus, her testimony at the evidentiary hearing – that she never discussed consent with the agents – is wholly inconsistent with the Defendant's own motion which affirmatively represents that agents made a request to search the residence albeit with the threat that agents would get a warrant if Mrs. Dominguez did not consent. Notably, neither the agents nor Mrs. Dominguez testified that agents threatened to get a warrant if she did not consent.

Accordingly, the Court finds that the testimony of Mrs. Dominguez regarding this issue is not credible and that the consistent and detailed testimony of two experienced law enforcement officers, each of whom testified that they asked for and obtained consent to search the residence, is more credible. Indeed, to accept Mrs. Dominguez' testimony at face value would paint a scenario in which two experienced law enforcement officers searched the entire residence without the consent of the homeowner and after having explained that consent was necessary for them to conduct a search.

Lastly, the execution of the Permission To Search Form, while not dispositive of consent – because it was executed after the search – is, nonetheless, probative of the issue of consent because the form clearly represents that the consent was given freely and voluntarily without threats or promises. However, there was conflicting evidence concerning what was said or not said when Mrs. Dominguez signed the consent. Mrs. Dominguez testified that the agents told her if she signed the consent form they would not

arrest her for the contraband discovered in the residence. The agents, of course, flatly deny that any such discussion took place. Instead the agents testified that before they searched the residence Mrs. Dominguez asked whether she would be arrested if they found anything and agents told her that she was not a target of the investigation and that she would not be arrested at that time. Indeed, Mrs. Dominguez was not arrested and has never been charged in this matter.

The Court again finds Mrs. Dominguez' testimony regarding this issue not to be credible for several reasons. First, the representation on the Permission to Search Residence form – that no threats or promises had been made – appears directly above Mrs. Dominguez' signature in plain English. Mrs. Dominguez never denied reading the form but attempted to qualify her reading of the form by stating that she read what she could understand. No reason nor explanation was offered by Mrs. Dominguez suggesting that she could not understand those words.

Lastly – and again most telling of Mrs. Dominguez' lack of credibility regarding this testimony – there is absolutely no mention in Defendant's motion of any discussion, promise or threat made by agents to Mrs. Dominguez that she would not be arrested if she signed the consent to search form. The fact that there is no mention of this discussion in Defendant's Motion To Suppress is highly suggestive that the discussion never took place and Mrs.

Dominguez came up with this "story" while on the witness stand to attempt to discount the effect of the consent form.[10]

Accordingly, for these reasons, the Court concludes that the agents requested and obtained the voluntary consent of Mrs. Dominguez before searching the residence and, therefore, the search of the Live Oak Residence did not violate the Fourth Amendment.

B. *Georgia v. Randolph* Does Not Require Suppression

Relying upon *Georgia v. Randolph,* Defendant argues that "no valid consent could be obtained from Patricia Dominguez when the agents were already aware of Defendant Dominguez-Ramirez' refusal to consent to a search of his residence." Defendant's argument is misplaced for two reasons.

First, it is incorrect to characterize the "consent" Defendant provided to the agents as "a refusal to consent to a search of his residence." The testimony was not controverted that the Defendant told agents

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[10] While the Court recognizes that Defendant's Motion To Suppress was prepared by Defendant's counsel, and not by Mrs. Dominguez, it is highly unlikely that Defendant inadvertently would omit an important discussion in the recitation of the facts in support of his motion, particularly in view of the fact that Defendant actually amended his motion to change facts in paragraph one of his Motion To Suppress.

they could search his residence but not until the morning. While the qualification "not to search until the morning" may have placed a time frame on the consent by the Defendant it was not a refusal to provide consent as Defendant suggests but rather a consent with qualification. Thus, in this case there was never a refusal to search by the co-owner husband sufficient to raise the issue of whether both tenants must consent before a search is conducted of jointly owned property.

Secondly, even assuming *arguendo* that the Defendant's consent with qualification was viewed as a refusal to consent, *Randolph* is still inapplicable because the Defendant, here, was not physically located at the premises when the refusal was made to law enforcement.

In *Randolph* the Supreme Court reviewed the propriety of a search of a marital home where the wife had called the police to investigate a domestic violence situation with her husband. When the police arrived, the husband – who was physically present at the residence – refused to give the police consent to search the residence even though the wife had granted permission to search the residence. Law enforcement officers entered the residence, recovered drug paraphernalia and then used that evidence to obtain a search warrant after which they found additional contraband. The Supreme Court held that the warrantless search of the residence over the objection of the physically present husband was unreasonable and therefore violated the Fourth

Amendment. *Randolph* therefore stands for the "straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of fellow occupant."[11] The *Randolph* Court, however, left intact the rule that the consent of only one co-tenant is sufficient so long as the objector is not present and the police have not removed the objecting tenant from the entrance for the sake of avoiding a possible objection.[12]

Here, law enforcement obtained the consent of the physically present wife, Patricia Dominguez and did not – as was the case in *Randolph* – search the premises over the objection of the physically present co-tenant. The Defendant was in custody at a location more than 15 minutes away from the residence and there was no evidence presented that the Defendant had been removed from the premises by law enforcement in order to avoid the Defendant from voicing his objection at the residence. Earlier that evening the Defendant was arrested several miles away at the Highway 40 Residence and then taken to the Sheriff's Office for questioning. The Defendant was never present at the Live Oak Residence that evening after

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[11] *Randolph* 126 S.Ct. at 1528.

[12] Thus, the *Randolph* Court expressly distinguished and left undisturbed its prior precedent in *United States v. Matlock*, 415 U.S. 164 (1974), which held that the "co-tenant's consent as good against 'the absent, nonconsenting resident." 415 U.S. at 170.

he left to meet his associate who had retrieved the furniture filled with kilogram packages of marihuana. Accordingly, *Randolph* simply does not support the Defendant's argument that the evidence located at the Live Oak Residence should be suppressed because the Defendant "refused" to consent to the search until morning.

IV. RECOMMENDATION

In view of the foregoing, it is respectfully **RECOMMENDED** that Defendant's Motion to Suppress Evidence (42) and Amended Motion To Suppress Evidence (Doc. 49) should be **DENIED**.

IN CHAMBERS at Ocala, Florida this 15th day of May, 2006.

/s/ Gary R. Jones
GARY R. JONES
United States
Magistrate Judge

Copies to:

Honorable Wm. Terrell Hodges
Senior United States District Judge

United States Attorney (Citro)
Counsel for Defendant